U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES O. TURNAGE and U.S. POSTAL SERVICE,
POST OFFICE, Shreveport, LA

Docket No. 02-1601; Submitted on the Record;
Issued December 4, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128 on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

This case is before the Board for the second time. In the first appeal, the Board affirmed the Office's March 23, 2000 decision denying appellant's request for reconsideration[1] of the merits of his claim under 5 U.S.C. § 8128(a).[2] The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

In a letter received by the Office on January 14, 2002, appellant requested reconsideration before the Office. By decision dated March 28, 2002, the Office found that appellant's request for reconsideration was untimely and did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; or (2) advance

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[1] Appellant requested reconsideration of an April 12, 1999 hearing representative's decision affirming a September 26, 1997 Office decision granting him a schedule award for a three percent impairment of the left upper extremity.

[2] *James Turnage*, Docket No. 00-2360 (issued August 3, 2001).

[3] 5 U.S.C. §§ 8101-8193.

a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its March 28, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision in appellant's claim was issued on April 12, 1999.[8] Appellant requested reconsideration by letter received by the Office on January 14, 2002, which was more than one year after April 12, 1999.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[9] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

[6] 20 C.F.R. § 10.607(b); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[7] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] The Board notes that it did not have jurisdiction to address the merits of appellant's claim in its August 3, 2001 decision.

[9] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[10] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

[11] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

construed so as to produce a contrary conclusion.[14] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[15] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[16] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[17]

In this case, the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of his request for reconsideration, appellant submitted a report of electrodiagnostic studies dated February 26, 2001 from Dr. David N. Adams, a Board-certified physiatrist, who noted that appellant had a normal left ulnar nerve conduction velocity but "slowing of the right and left ulnar nerves across the elbows." Dr. Adams did not address the extent of appellant's permanent impairment of the left upper extremity and thus his report is of little relevance to the issue at hand.

Appellant further submitted progress notes from Dr. Marion E. Milstead and Dr. G. Michael Haynie, Board-certified orthopedic surgeons, dated October 19, 1999 to November 8, 2001. In these progress notes, neither Dr. Milstead nor Dr. Haynie discussed the extent of appellant's permanent impairment of the left upper extremity and thus their opinions are not relevant to the pertinent issue in this case and do not constitute grounds for reopening appellant's case for a merit review.

In a report dated January 14, 1999, Dr. Austin W. Gleason, a Board-certified orthopedic surgeon, diagnosed thoracic outlet syndrome and recommended restricted work activities. However, as he did not address the relevant issue of the extent of appellant's permanent left upper extremity impairment, his report is insufficient to raise a substantial question as to the correctness of the prior Office merit decision.

Appellant resubmitted an impairment rating dated January 18, 1999 from Dr. Milstead and a report dated May 4, 1998 from Dr. James Lee Etheredge, a Board-certified orthopedic surgeon. However, as this duplicated evidence already of record, it is insufficient to establish clear evidence of error.

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[14] *See Leona N. Travis, supra* note 12.

[15] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[16] *See Leon D. Faidley, Jr., supra* note 7.

[17] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.[18]

The decision of the Office of Workers' Compensation Programs dated March 28, 2002 is hereby affirmed.

Dated, Washington, DC
December 4, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] If appellant believes that his permanent impairment of the left upper extremity has increased, he can file a claim for an additional schedule award and submit supporting documentation.